(8)

No. 05-502

FEB 21 2006

IN THE

Supreme Court of the United States

BRIGHAM CITY,

Petitioner,

v.

CHARLES W. STUART, SHAYNE R. TAYLOR, AND SANDRA TAYLOR,

Respondents.

On Writ of Certiorari to the Utah Supreme Court

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits police from entering a residence without a warrant to break up a party that they have observed through an open window and door involves assaultive behavior and unlawful underage drinking that the adults within have been unable or unwilling to control.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] State and local governments exercise primary responsibility for responding to breaches of the peace and the public expects state and local law enforcement agencies to respond quickly and effectively to events such as occurred in this case. *Amici* accordingly have a strong interest in preserving the ability of the police to take prompt and effective action in situations involving ongoing violence and underage drinking.

This case presents a classic example of the challenges facing law enforcement officers confronting a breach of the peace. Responding to a complaint about loud noise at a residence at 3:00 a.m., police officers encountered a raucous party in progress involving, among other things, the unlawful consumption of alcohol by minors. Through an open window and screen door, the officers saw an intoxicated and violent juvenile who resisted restraint by four adults and punched one of the adults in the face. The officers put a halt to the revels by entering the residence, restoring order, and arresting the adults for contributing to the delinquency of a minor. The Utah Supreme Court ruled, however, that the officers violated the Fourth Amendment because they lacked a warrant to enter the residence. Affirmance of the judgment below would leave the police helpless to promptly and effectively put a halt to a breach of the peace involving ongoing criminal conduct.

In *amici*'s view, the Fourth Amendment does not prevent the police from taking reasonable measures to stop ongoing

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, has made a monetary contribution to the preparation or submission of this brief.

criminal conduct occurring in the officers' presence, even if they must cross the threshold of a residence to do so. Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

STATEMENT OF THE CASE

At approximately 3:00 a.m. on July 23, 2000, four Brigham City police officers were directed by a police dispatcher to proceed to a residence at 1074 Orchard Street in response to a complaint about loud noise. J.A. 24-25, 27, 44. Officers Jeff Johnson and Mike DeRyke arrived first, and heard yelling and commotion emanating from the residence, including people "yelling stop, stop" and "get off me." *Id.* at 28; see also *id.* at 25-28. Shortly thereafter, Sergeant Ken Broadhead and Officer Trent Gunn arrived, and the officers then heard additional commotion coming from the house that sounded like an altercation was occurring inside. *Id.* at 28-29, 64-65.

The four officers walked up to the front of the house to investigate, and although they could see a beer bottle on the ledge of the front window, they could not see inside the house because the front rooms were dark. *Id.* at 30-32, 47. Officer Gunn remained in front to secure that egress while the other officers walked along a driveway toward the rear, continuing to hear what sounded like a fight going on inside the house. *Id.* at 32-35.

The trial court found that in light of what they had heard and because it was "obvious" that knocking on the front door would have accomplished nothing, "[i]t was appropriate that th[e officers] proceed down the driveway along the house to further investigate." Pet. App. 47. After walking down the driveway, the officers looked through a slat fence around the residence's back yard, and saw two juveniles drinking beer in the back yard. J.A. 34-37, 66-67. Under Utah law, it is unlawful for any person under age 21 to possess or consume

alcoholic beverages. See Utah Code Ann. §§ 32A-1-105 (30) & 32A-12-209(1) (2005). The trial court found that "[a]t that point, because of the juveniles, there was probable cause for the officers to enter into the backyard." Pet. App. 47.

While Sgt. Broadhead detained the juveniles in the back yard, Officers Johnson and DeRyke walked toward the house. J.A. 36-38, 50. Through a back window, Officer Johnson saw four adult males trying to restrain a juvenile, who in turn was struggling to break free, as the participants to the altercation exchanged threats and obscenities and the adults ordered the juvenile to calm down. *Id.* at 38-39, 58, 72. As Officer Johnson approached the back door, he saw the juvenile free one of his hands and land a punch, bloodying the mouth of one of the adults. *Id.* at 40, 60-61.[2] The trial court specifically found that the officers saw this altercation, including the punch. Pet. App. 47.

Officer Johnson stepped inside the back door and "yelled police," but could not be heard over the tumult. J.A. 40, 62. As Officer Johnson continued to yell for order, the occupants of the house became aware of the officers' presence and the fight gradually came to a halt. *Id.* at 41, 62. Officers Johnson and DeRyke then stepped between the combatants and handcuffed the juvenile. *Id.* at 41, 73.

At that point, the occupants in the house began yelling at the officers, demanding that they leave. *Id.* at 42, 73, 79. The verbal altercation inside the house escalated to the point that Sgt. Broadhead felt it necessary to leave the juveniles who were in his custody in order to assist Officers Johnson and DeRyke inside the house. *Id.* at 42. Ultimately, the officers placed the adults under arrest. Pet. App. 35. The adults,

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[2] Although the screen door was shut, the back door of the house was open and for this reason Officer Johnson was able to see through the door. J.A. 38-40.

now respondents, were charged with contributing to the delinquency of a minor, disorderly conduct, and intoxication. *Id.* at 3.

The trial court granted respondents' motion to suppress all evidence obtained as a result of the officers' entry of the residence on the ground that it was obtained by an unreasonable search and seizure in violation of the Fourth Amendment. The trial court found

> no exigent circumstances sufficient to justify the officer's entry into the residence. What he should have done, as required under the 4th amendment, was knock on the door. The evidence was that there was a loud, tumultuous thing going on, and the evidence is that the occupants probably would not have heard him, but under the 4th amendment he has an obligation to at least attempt before entering.

Id. at 47.

On Brigham City's appeal, the Utah Court of Appeals held that there was no exigency that justified a warrantless entry of the residence. See *id.* at 40-41. Judge Bench dissented, reasoning that "[i]t is nonsensical to require officers, charged with keeping the peace, to witness this degree of violence and take no action until they see it escalate further." *Id.* at 44.

The Supreme Court of Utah affirmed. The court first rejected the need to render emergency aid as a justification for the warrantless entry, concluding that "[t]he magnitude of the harm fell short of the serious bodily injury threshold necessary to access the emergency aid doctrine." *Id.* at 14. The court next found no exigent circumstance justifying the entry, agreeing with the trial court that the officers violated the Constitution because they "made no attempt to knock before entering" even though, as the trial court found, "a

knock 'probably would not have been heard.'" *Id.* at 20.[3] Justice Durrant dissented, concluding that the officers' responses to the exigent circumstances were reasonable in light of the finding that they would not have been heard had they attempted to announce their presence from outside the residence. *Id.* at 31-32. Justice Durrant reasoned that "the Fourth Amendment does not prescribe paralysis when law enforcement officers are eyewitnesses to an ongoing assault and immediate intervention is necessary to prevent physical harm." *Id.* at 25-26.

SUMMARY OF ARGUMENT

While the text of the Fourth Amendment places specific restrictions on the issuance of warrants, when it addresses warrantless police action the Amendment prescribes only the overarching requirement of reasonableness. The text and history of the Fourth Amendment make plain that its Warrant Clause was intended to restrict the circumstances under which a warrant could issue because of the limitations on judicial review of the execution of a warrant, rather than to create a rigid presumption against warrantless search and seizure.

To be sure, it is frequently reasonable for the police to seek a warrant before they enter a residence, where important privacy interests are at stake, because a warrant ensures independent judicial review of the justification for an entry before it occurs. Nevertheless, there are circumstances when it is reasonable for the police—especially when, as here, they observe an assault and other criminal activity occurring within a residence—to act immediately, without seeking a

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[3] The precise finding of the trial court regarding the futility of a police knock was slightly different than the language quoted by the Utah Supreme Court. See Pet. App. 47 ("The evidence is that there was a loud, tumultuous thing going on, and the evidence is that the occupants probably would not have heard him . . . .").

warrant. In such cases, a warrantless entry of a residence is subject to judicial review under the Fourth Amendment for reasonableness.

In this case, the warrantless entry of the residence was objectively reasonable and therefore did not violate the Fourth Amendment. It was plain to the officers arriving at the scene that the proceedings at the residence were out of the control of the adults within. Although the adults were attempting to restrain the juvenile who had punched one of them just seconds before the officers entered the residence, the police reasonably decided to put a stop to the revels without the delay inherent in seeking a warrant. The warrant requirement is imposed in order to minimize the risk of an unjustified intrusion on the sanctity of the home, but here, in light of what the officers had seen, the risk of such an unjustified intrusion was nonexistent. Accordingly, the Fourth Amendment did not require the officers to desist from taking control of the scene until they could obtain a warrant.

Nor were the officers constitutionally obligated to attempt to persuade the occupants of the residence to restore order from outside the threshold. That option might have been some sort of least restrictive means of attempting to enforce the law. The Fourth Amendment does not, however, impose a "least restrictive means" test that permits the judiciary to second-guess police conduct with benefit of hindsight. In this case, the police had a compelling interest in acting immediately to put a halt to the ongoing criminal conduct that they observed. The police conduct at issue here satisfied the Fourth Amendment's fundamental requirement of reasonableness.

ARGUMENT

While it places specific restrictions on the issuance of warrants, the Fourth Amendment imposes only one requirement on police acting without a warrant—reasonableness.

There is no rigid rule requiring a warrant before the threshold of a residence is crossed; it is reasonable to dispense with the requirement of a warrant when the police need to take immediate action. In particular, when the police have an objectively reasonable belief that they must enter a residence without the delays associated with obtaining a warrant in order to put a stop to an ongoing breach of the peace and other criminal conduct, they may do so consistent with the Fourth Amendment. When, as here, the circumstances make clear that a warrantless entry into a residence is objectively reasonable, there is no requirement that peace officers desist from enforcing the law and restoring order until they obtain a warrant or pursue some alternative course of action that is arguably less intrusive on privacy interests. The judgment of the Supreme Court of Utah should therefore be reversed.

I. THE FOURTH AMENDMENT PERMITS WARRANTLESS ENTRY OF A RESIDENCE WHEN THE POLICE REASONABLY BELIEVE THAT IMMEDIATE ENTRY IS NECESSARY.

A. The Fourth Amendment Permits Warrantless Entry Of A Residence When It Is Objectively Reasonable To Act Without Delay.

The Fourth Amendment's text contains specific rules governing warrants, but the only requirement for police search or seizure decisions made on the scene is that they be reasonable. The Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Accordingly, while warrants must satisfy specific rules involving probable cause, oath or affir-

mation, and particularity, when it comes to warrantless police activity, the Fourth Amendment prohibits only "unreasonable searches and seizures." Thus, as this Court has explained in the context of warrantless search and seizure, "[t]he touchstone of the Fourth Amendment is reasonableness." *United States v. Knights*, 534 U.S. 112, 118 (2001). Accord, *e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977).

The Fourth Amendment's more stringent standards governing the issuance and use of warrants were deliberate. The Framers were especially concerned about warrants because they insulated a resulting search and seizure from judicial review:

> [T]he warrant was a means of insulating officials from personal liability assessed by colonial juries. An officer who searched or seized without a warrant did so at his own risk; he would be liable for trespass, including exemplary damages, unless the jury found that his action was "reasonable." If, however, the officer acted pursuant to a proper warrant, he would be absolutely immune. By restricting the issuance of warrants, the Framers endeavored to preserve the jury's role in regulating searches and seizures.

California v. Acevedo, 500 U.S. 565, 581-82 (1991) (Scalia, J., concurring in the judgment) (citations omitted).[4]

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[4] See also *Vernonia School District 47J v. Acton*, 515 U.S. 646, 669-71 (1995) (O'Connor, J., dissenting); *United States v. Leon*, 468 U.S. 897, 970-72 (1984) (Stevens, J., dissenting). Despite some differences among them on details, the leading scholars of the Fourth Amendment share the view that the Warrant Clause was primarily a response to concerns about the unique potential for abuse of power granted by a warrant. See, *e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 764-81 (1994); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 619-69 (2000); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393, 396-411 (1995); Telford Taylor, *Two Studies in Constitutional Interpretation*.

These concerns about the warrant as a means of insulating search and seizure from judicial review remain relevant today. While the police are no longer afforded absolute immunity from liability when executing a warrant, see *Malley v. Briggs*, 475 U.S. 335, 340-41 (1986), the scope of judicial review of warrants is significantly circumscribed. When a warrant issues, it is settled that the "magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)). Accordingly, "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U.S. 102, 106 (1965). Moreover, the rule barring the use of evidence obtained in violation of the Fourth Amendment is inapplicable to evidence obtained in reasonable reliance on a warrant. See, *e.g.*, *Arizona v. Evans*, 514 U.S. 1, 10-15 (1995); *Leon*, 468 U.S. at 922-25. In light of the enormous authority granted by a warrant, this Court properly insists on compliance with the specific requirements of the Warrant Clause before it will treat a document as deserving of the special status of a properly authorized warrant. See, *e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 557-58 (2004).

The Warrant Clause, however, is by its terms inapplicable to warrantless search and seizure. Warrantless police conduct is subject to unfettered judicial review; under the Fourth Amendment's first clause, warrantless police action is evaluated for reasonableness. Because warrantless search and seizure is subject to full and independent judicial review, there is no textual, historical, or policy justification for subjecting it to any standard of review more searching than reasonableness.

Search, Seizure, and Surveillance and Fair Trial and Free Press 19-46 (1969).

To be sure, the absence of a warrant informs an assessment of whether a search is constitutionally reasonable. *Payton v. New York*, 445 U.S. 573 (1980), which held that a warrantless arrest of an individual within his home ordinarily violates the Fourth Amendment, stated that "searches and seizures inside a home without a warrant are presumptively unreasonable." *Id.* at 586. The Court reasoned that "the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'. . . [T]he warrant procedure minimizes the danger of needless intrusions of that sort." *Id.* at 585-86 (citations and footnote omitted) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972) (footnote omitted)).

Elaborating, the Court quoted Justice Jackson's famous explanation of the warrant requirement:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 586 n.24 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). Thus, the preference for warrants is a means of achieving constitutional reasonableness by protecting the innocent against unwarranted invasions of particularly important privacy interests. Cf. *United States v. Rabinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting) ("[T]he founders of this country subordinated police action to legal restraints, not in order to convenience the guilty but to protect the innocent.").[5]

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[5] One commentator put it this way:

> [W]hy has the Court invalidated so many searches and seizures that have produced evidence of crime? In many cases, the answer is that

A warrantless entry into a home, however, is not always constitutionally unreasonable. As this Court has explained, "[t]he ordinary requirement of a warrant is sometimes supplanted by other elements that render an unconsented search 'reasonable.'" *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990). Thus, "circumstances may render a warrantless search or seizure reasonable." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001). The presence of exigent circumstances necessitating immediate entry into a residence is one example in which it is constitutionally reasonable to enter a home without waiting for the issuance of a warrant. See, *e.g.*, *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).[6]

In *Hayden*, for example, the Court held that police could enter a residence in pursuit of an armed robber who had gone into the house minutes earlier, reasoning that "[s]peed here was essential." 387 U.S. at 299. Similarly, it is settled that the Fourth Amendment permits a warrantless entry into a

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> at the time of the search there was an insufficient probability of finding the evidence to justify the risk that an innocent person may be subject to the search. In legal jargon, the Court says that the police lacked probable cause. In other cases, the potential bias of the decisionmaker, be it a policeman or an attorney general, has caused the Court to invalidate a search or seizure. The Court has reasoned that unless a neutral and detached magistrate makes the judgment to allow the search or seizure, there is an unjustifiably high risk that one "engaged in the often competitive enterprise of ferreting out crime" will subject an innocent person to a search or seizure.

Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 Mich. L. Rev. 1229, 1229-30 (1983) (footnotes omitted) (quoting *Johnson*, 333 U.S. at 14).

[6] In *Payton* itself, the Court was careful to note that it had no occasion in that case "to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." 445 U.S. at 583.

burning building to extinguish a fire and "to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished." *Michigan v. Tyler*, 436 U.S. 499, 510 (1978) (footnote omitted). That is because an "immediate investigation" of a fire's origin may assist "to prevent its recurrence, as through the detection of continuing dangers," and "to preserve evidence from intentional or accidental destruction." *Id.* Thus, a warrantless search may be constitutionally reasonable when circumstances call for prompt action without the delays inherent in securing a warrant.

It remains to consider the standards under which a police officer is permitted to conclude that exigent circumstances justify a warrantless entry into a residence. It is to that question that we next turn.

B. A Police Officer's Assessment Of The Existence Of Exigent Circumstances Is Reviewed Under The Fourth Amendment For Reasonableness.

Because this case is not governed by the Warrant Clause, the officers' decision that the exigencies they confronted justified a warrantless entry is properly reviewed for reasonableness. To be sure, when it comes to exigent circumstances, the standard of constitutional reasonableness generally requires that the police have probable cause to believe that an exigency justifying a warrantless entry is present. See *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). Probable cause, however, is neither a technical nor a rigid standard; to the contrary, it embodies the standard of reasonableness. As this Court has explained, "'[i]n dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Gates*, 462 U.S. at 231 (ellipsis in original) (quoting *Brinegar v. United States*,

338 U.S. 160, 175 (1949)). Accord, *e.g.*, *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Gates*, 462 U.S. at 231); *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (same).

For example, in *Schmerber v. California*, 384 U.S. 757 (1966), the Court held that a police officer could require an individual whom he had probable cause to believe had unlawfully driven a vehicle while intoxicated to provide a blood sample because "[t]he officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Id.* at 770 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)). The Court reasoned that inasmuch as "the percentage of alcohol in the blood begins to diminish shortly after drinking stops . . . there was no time to seek out a magistrate and secure a warrant." *Id.* at 770-71.

Thus, a police officer's reasonable belief that he is confronting an exigency is sufficient to establish constitutional reasonableness. The reasonableness of police action within the meaning of the Fourth Amendment is assessed under an objective standard, without reference to the actual motivations of the officers on the scene. See, *e.g.*, *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *Whren v. United States*, 517 U.S. 806, 812-13 (1996). As the Court explained in *Ornelas*,

> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.

517 U.S. at 696. Accordingly, because in this case an objectively reasonable officer would have believed that there was a sufficiently serious exigency to warrant an immediate

entry into the residence rather than delaying until a warrant could be obtained, the warrantless entry of the residence was constitutional.

II. THE DECISION OF BRIGHAM CITY POLICE OFFICERS TO ACT IMMEDIATELY TO TAKE CONTROL OF THE SCENE OF ONGOING CRIMES WAS REASONABLE.

The Brigham City police officers did not exceed the bounds of constitutional reasonableness when they crossed the threshold of 1074 Orchard Street without a warrant. The party at that location was out of control, and the police reasonably took control of the situation rather than pleading with the occupants from outside the threshold or waiting for the issuance of a warrant. In light of what the officers had already seen from outside the residence, a warrantless entry posed no risk of an unjustifiable invasion of privacy, and was an objectively reasonable means of restoring order and keeping the peace. Accordingly, it did not violate the Fourth Amendment.

A. The Warrantless Entry Was Reasonable.

As a consequence of their observations from outside the house, the police officers on the scene reasonably concluded that a beer bash of considerable proportions was underway. Officer Johnson testified that in circumstances like these, he had observed as many as 20 or 30 underage drinkers trying to flee a residence as the police approached. J.A. 25. The trial court found that the noise coming from the residence was so loud that the officers reasonably concluded that seeking entry from the front door would have been impracticable, that they could not have been heard even when they were in the back yard just outside the kitchen, and that the revels at the

residence included both underage drinking and assaultive behavior. See Pet. App. 46-47.[7]

To be sure, the trial court also found "no exigent circumstances sufficient to justify the officer's entry into the residence." *Id.* at 47.[8] Read most favorably to respondents, perhaps that finding suggests that the officers might have believed that the adults present were able to restrain the juvenile who had just punched one of them and that a warrantless entry was not justified on the ground that either the juvenile or the injured adult was "in need of immediate aid."

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[7] The lower courts did not find that the officers' entry into the backyard or their observation of the struggle going on inside the house while in the backyard violated the Fourth Amendment, nor did respondents press that position in the courts below. Indeed, the Utah Supreme Court stated that the officers' observations from outside of the residence "are not at issue." Pet. App. 9. Inasmuch as the officers were able to see into the backyard through the slats of the fence while standing in a location that was easily accessible to the public, it is apparent that respondents had no reasonable expectation of privacy in the backyard that would entitle them to invoke Fourth Amendment protections. See, *e.g.*, *California v Ciraolo*, 476 U.S. 207, 211-15 (1986); *Maryland v Macon*, 472 U.S. 463, 469 (1985). See also *Minnesota v Carter*, 525 U.S. 83, 103-06 (1998) (Breyer, J., concurring in the judgment). Moreover, under the Fourth Amendment, the authorities may enter property in which there is no reasonable expectation of privacy, even if their conduct amounts to a technical trespass. See *Oliver v. United States*, 466 U.S. 170 (1984). Similarly, the Fourth Amendment permits the police to act on what they see in plain view from a location where they have a right to be because such observations compromise no legitimate expectation of privacy. See, *e.g.*, *Horton v California*, 496 U.S. 128 (1990). Nothing in the findings suggests that any legitimate expectation of privacy held by any of the respondents was infringed by the police entry into the backyard or by the observations the police made prior to their entry into the home.

[8] The trial court's conclusion on this point is not entitled to deferential review. This Court undertakes independent review of the justification for police conduct under the Fourth Amendment, deferring only to the trial court's determination of purely historical facts. See *Ornelas*, 517 U.S. at 696-700.

Mincey v. Arizona, 437 U.S. 385, 392 (1978). But that does not mean that the officers lacked an objectively reasonable belief that immediate police action was necessary to restore order.

The officers on the scene had ample reason to believe that the adults at 1074 Orchard Street could not be trusted to handle the situation with which they were confronted. Those adults were permitting unlawful underage drinking that had already produced at least one predictable result—a physical altercation between one juvenile and four adults. See J.A. 35. If the police had remained outside the residence until they procured a warrant, the unlawful activities within might well have continued and even escalated.

Moreover, even if, as the lower courts evidently believed, the police could have halted the unlawful activities within by pleading for order from outside the house, the delay inherent in obtaining a warrant would have risked the destruction of evidence, as in *Schmerber*.[9] See 384 U.S. at 770. It would also have created a risk that the individuals inside the house could have fled while a warrant was being sought. See J.A. 25, 45, 48, 49. Indeed, some of these suspects might have driven away from the residence, creating a further risk that impaired individuals might drive while intoxicated. Taking control of the scene and physical custody of the perpetrators was the course of action best tailored to restore order, prevent further unlawful conduct, and minimize risk of harm.

Futhermore, in assessing the justification for a warrantless entry, the officers could reasonably consider that it takes substantial time to obtain a warrant. The most expeditious means of obtaining a warrant is by telephone, which requires

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[9] Although the record does not indicate whether any blood or breath tests were performed, at the time the officers entered the residence they could not know whether there might be a necessity for the prompt administration of such tests.

no written application. Under Utah law, an officer can obtain a telephonic warrant by contacting a state magistrate and providing the magistrate with "sworn oral testimony" that must be "recorded and transcribed." Utah Code Ann. § 77-23-204(2) (Bender 2000). The officer must also read the proposed warrant verbatim to the magistrate, who must then consider whether changes should be made before authorizing the officer to sign the magistrate's name to the warrant. See *id.* Federal law contains similar rules governing telephonic warrants. See Fed. R. Crim. P. 41(d)(3)(A).

These requirements are hardly excessive; they are likely compelled by the Warrant Clause's oath or affirmation and particularity requirements. See, *e.g.*, *Groh*, 540 U.S. at 557-58. But given the need for precision in both the oral warrant application and the draft warrant itself, composing even a telephonic warrant application is not simple; the Utah Supreme Court has acknowledged that this process "can take significant time." *State v. Ashe*, 745 P.2d 1255, 1268 (Utah 1987). The case law suggests that obtaining a telephonic search warrant can take from thirty minutes to two hours. See, *e.g.*, *United States v. Tarazon*, 989 F.2d 1045, 1050 (9th Cir. 1993) (thirty minutes insufficient); *United States v. Thomas*, 893 F.2d 482, 485 (2d Cir.) (at least two hours required in New York), *vacated on other grounds*, 916 F.2d 766 (2d Cir. 1990); *United States v. Cuaron*, 700 F.2d 582, 590 (10th Cir. 1983) (thirty minutes insufficient); *United States v. Hackett*, 638 F.2d 1179, 1183 (9th Cir. 1980) (twenty to thirty minutes insufficient); *United States v. Morgan*, 744 F.2d 1215, 1222 (6th Cir. 1985) (thirty minutes sufficient). And in this case the delay inherent in obtaining a warrant would only be increased by the need to locate and rouse a magistrate at 3:00 a.m.

Under these circumstances, it was reasonable for the officers to conclude that the best course of action was for them to enter the residence, take control of the scene, and place those

whom they had observed violate various state criminal laws in custody. The officers had ample reason not to leave the adults who had already let the party get out of control in charge of the premises until a warrant could be obtained. Immediate entry also avoided the potentially substantial delays necessary to obtain a warrant, while ensuring that unlawful underage drinking and assaultive behavior would immediately stop and that no suspects would be able to flee. And by acting immediately, the officers exercised a prerogative the law has traditionally recognized to restore order by making warrantless arrests for offenses committed in their presence. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 329-32, 342-45 (2001); *United States v. Watson*, 423 U.S. 411, 418 (1976). See also *City of Chicago v. Morales*, 527 U.S. 41, 106-09 (1999) (Thomas, J., dissenting).

Most important, under the circumstances of this case the rationale for a warrant vanishes. As we explain above, a warrant is presumptively required for an entry into a residence in order to "minimize[] the danger of needless intrusions" into the privacy of the home by requiring that the pertinent "'inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Payton*, 445 U.S. at 586 & n.24 (quoting *Johnson*, 333 U.S. at 14). Here the officers were not required to draw any inferences; they were confronted with blatantly unlawful conduct occurring within their plain view. Permitting a warrantless entry under these circumstances creates no meaningful risk of a "needless" intrusion on the privacy of the home; but requiring a warrant would place obstacles in the way of officers trying to restore order and enforce the law. Surely the Fourth Amendment's practical and commonsense standard of reasonableness does not require a warrant when the authorities' observations have made it clear that a warrantless search and seizure would not compromise any legitimate expectation of privacy. Cf. *Minnesota v. Carter*, 525 U.S. 83,

105-06 (1998) (Breyer, J., concurring in the judgment) (warrantless observation of drug activity inside apartment through gap in drawn blinds was constitutionally reasonable); *United States v. Jacobsen*, 466 U.S. 109, 118-21 (1984) (federal agents' warrantless opening of parcel and removal and examination of white powder that Federal Express employees had already inspected and described to them infringed no protected expectation of privacy).

B. The Police Lawfully Treated The Crimes They Observed As Sufficiently Serious To Justify A Warrantless Entry.

The Utah Supreme Court expressed concern that the magnitude of the harm threatened by the events at issue in this case was not sufficient to support a warrantless entry of a residence. See Pet. App. 14, 17-18. Indeed, in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), this Court held that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed." *Id.* at 753. On that basis, the Court concluded that a warrantless entry of a residence to arrest a suspected drunk driver who had recently arrived home in an apparently intoxicated state violated the Fourth Amendment. *Id.* *Welsh* distinguished *Schmerber* on the ground that "Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible." *Id.* at 754.

In this case, by contrast, the offense at issue—contributing to the delinquency of a minor—is punishable under Utah law by up to six months imprisonment. See Utah Code Ann. §§ 76-3-204(2) & 76-10-2301 (West 2005).[10] Thus, *Welsh*

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[10] The other offenses that supported respondents' arrests were also jailable. Disorderly conduct, which is defined to include "mak[ing] unreasonable noises in a private place which can be heard in a public place,"

provides no support for the decision below. What is more, unlike *Welsh*, this case involves conduct that threatens the welfare of minors, and that fact implicates important state interests that favor immediate police intervention. It is well settled that the States have a compelling interest in protecting the well-being of minors. See, *e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990); *Ginsberg v. New York*, 390 U.S. 629, 640 (1968). In *Welsh*, however, no comparable and ongoing threat to the welfare of minors or others was present. To the contrary, the Court stressed that because Welsh had "already arrived home, and had abandoned his car at the scene of the accident, there was little remaining threat to the public safety." 466 U.S. at 753.

In this case, just prior to the warrantless entry minors were drinking alcohol and the adults had lost control of events. A warrantless entry here ensured that underage drinking was halted and that a violent and possibly intoxicated minor could be safely returned to his parents by the authorities. Moreover, the officers had already observed several criminal offenses, and, as noted above, the law has long recognized the propriety of peace officers making warrantless arrests for offenses committed in their presence. See *Atwater*, 532 U.S. at 336-40. These important governmental interests—preventing underage drinking, protecting minors, and restoring public order—were not present in *Welsh*.

Utah Code Ann. § 76-9-102(1)(b)(iii) (2005), "is a class C misdemeanor if the offense continues after a request by a person to desist." *Id.* § 76-9-102(3). The punishment for a class C misdemeanor includes a term of imprisonment not exceeding ninety days. *Id.* § 76-3-204(3). And under Utah law, "[a] person may not permit any other person to become intoxicated or any intoxicated person to consume any alcoholic beverage in: any premises of which the person is the owner, tenant, or occupant . . . ." Utah Code Ann. § 32A-12-216(1)(a) (2005). A violation of this prohibition is a class C misdemeanor. *Id.* § 32A-12-216(2).

The State of Utah is entitled to treat the conduct at issue in this case as a sufficiently serious offense to justify a warrantless entry. Underage drinking is a major public health problem. For example, while representing only seven percent of licensed drivers, persons under age 21 represent thirteen percent of those involved in fatal traffic accidents "who had been drinking." Committee on Developing a Strategy to Reduce and Prevent Underage Drinking, National Research Council and Institute of Medicine, *Reducing Underage Drinking: A Collective Responsibility* 60 (Richard J. Bonnie & Mary Ellen O'Connell eds., 2004).[11] The consumption of alcohol also impairs judgment and increases the risk of violent and other risk-taking behavior. See *id.* at 58-65.[12] In light of the magnitude of the societal problems posed by underage drinking, surely it qualifies as a sufficiently serious problem to justify a warrantless entry under exigent circumstances.

Finally, to the extent *Welsh* is relied upon to support the judgment below, the soundness of that decision is open to question. In *Welsh*, Justice Brennan wrote for the Court that Wisconsin's classification of driving while intoxicated as a nonjailable offense was "the best indication of the State's interest in precipitating an arrest." 466 U.S. at 754. More

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[11] Indeed, its concern about underage drinking led Congress to enact the National Minimum Drinking Age Act which made the States' receipt of federal highway funding conditional upon setting a minimum drinking age of 21. See *South Dakota v. Dole*, 483 U.S. 203, 208-09 (1987).

[12] "[A]lcohol [is] reported to be involved in 36 percent of homicides, 12 percent of male suicides, and 8 percent of female suicides involving people under 21—a total of about 1,500 homicides and 300 suicides in 2000." *Reducing Underage Drinking*, *supra*, at 61. Alcohol use among youths is strongly correlated with violence, suicidal behaviors, use of illegal drugs, and sexually risky behaviors. See Ralph Hingson & Donald Kenkel, National Research Council and Institute of Medicine, *Social, Health, and Economic Consequences of Underage Drinking*, in *Reducing Underage Drinking*, *supra*, 351, at 357-60.

recently in *Atwater*, however, the Court took a very different approach. *Atwater* held that the Fourth Amendment permits custodial arrests for nonjailable traffic offenses and articulated a variety of legitimate state interests in making such arrests. See 532 U.S. at 348-54. In particular, the Court explained that Fourth Amendment jurisprudence reflects "an essential interest in readily administrable rules." *Id.* at 347. A rule making the propriety of a search or seizure depend on whether an offense is jailable would fail this test because

> an officer on the street might not be able to tell. It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes, but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest. Is this the first offense or is the suspect a repeat offender? Is the weight of marijuana a gram above or a gram below the fine-only line? Where conduct could implicate more than one criminal prohibition, which one will the district attorney decide to charge? And so on.

Id. at 348-49 (citation and footnotes omitted).[13]

There is considerable tension between *Welsh*'s view that a State has no legitimate interest in making custodial arrests for nonjailable offenses and the subsequent holding in *Atwater*. In light of the approach taken in *Atwater*, the decision in *Welsh* is a particularly slender reed on which to support the decision below.

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[13] *Welsh* itself illustrates this point. The offender in *Welsh* had in fact committed a jailable offense since he had a prior conviction for drunk driving, although the arresting officers did not know this at the time of his arrest. See *Welsh*, 466 U.S. at 746 n.6. In *Atwater*, the Court took special note of this point. See 532 U.S. at 348 n.18. The *Atwater* Court also cited the dissenting opinion in *Welsh* with approval. See *id.* at 341.

C. The Officers Were Not Required To Explore Other Means Of Restoring Order Before They Entered The Residence.

The Utah Supreme Court ruled that the Brigham City police officers should have attempted to quell the disturbance by "attempt[ing] to knock before entering" the residence, Pet. App. 20, even though it acknowledged the trial court's finding that a knock probably would have been futile. See *id.* (noting trial court's finding that "owing to the noise and tumult in the kitchen a knock 'probably would not have been heard'"). See also *id.* at 47 (trial court finding on futility of police knock). The Fourth Amendment's practical and commonsense standard of reasonableness does not require the police to undertake what are likely to be ineffectual measures before they can enter a residence to take control of a breach of the peace; nor does it require the police to delay taking action when they confront an exigency.

Although the Fourth Amendment presumptively requires officers to knock and announce their authority when executing a warrant for the search of a residence, see *Wilson v. Arkansas*, 514 U.S. 927 (1995), that presumption is overcome "if circumstances support a reasonable suspicion of exigency when the officers arrive at the door." *United States v. Banks*, 540 U.S. 31, 37 (2003). For example, the police are not required to knock and announce their authority before entering a residence when they "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). Surely there is no justification for any different standard governing a warrantless entry under exigent circumstances, as in this case. And here, given the finding of the trial court, it is plain that the officers could have reasonably believed that knocking and

pleading for order from outside the threshold would have been futile given the tumult they observed within. Moreover, given the exigency that justified immediate action to take control of the scene, the officers were under no obligation to delay entry.

Indeed, applying the knock-and-announce principle to this case borders on the absurd. The purpose of the knock-and-announce requirement is to minimize the need to damage private property by a forced entry and to give the occupants an opportunity to prepare themselves for entry. See *Richards*, 520 U.S. at 393 n.5. Here, the officers could enter through an unlocked screen door and probably could not be heard over noise of the ongoing fight. See Pet. App. 47 (trial court findings). Moreover, the fight was occurring in the kitchen, an inherently dangerous location. See J.A. 63 (Officer Johnson's testimony that "[k]itchens are full of weapons"). Under these circumstances, the officers could reasonably believe that "knocking and announcing . . . would be dangerous or futile," *Richards*, 520 U.S. at 394, and that the knock-and-announce rule simply was inapplicable.

One might also hypothesize that the police could have restored order and prevented flight from the scene by impounding the premises from the outside pending the issuance of a warrant. To be sure, this Court has held that the police may quarantine a residence pending the issuance of a warrant when they have probable cause to believe that evidence of a crime is within but lack exigent circumstances that would justify a warrantless entry. See *McArthur*, 531 U.S. at 331-34. Insisting on the use of a quarantine in this case, however, would have required the posting of officers at all points of egress to ensure that no one left the residence while other officers prepared a warrant application and roused a judge at 3:00 a.m.

Such a course of action would place great strain on police resources. Indeed, the record contains testimony that all four

Brigham City police officers on duty at the time responded to the call concerning 1074 Orchard Drive, including two officers who were thereby diverted from DUI patrol. See J.A. 24-25. A rule requiring impoundment of premises would leave the city without an officer to respond to auto accidents, crime victims, domestic violence, or other reports of suspicious or criminal activity. In the event some officers were summoned to another incident before the warrant could be obtained or executed, the Utah Supreme Court's approach would likely require the abandonment of the operation or flight of some or all of the suspects. See *id.* at 25. Surely the Fourth Amendment's standard of reasonableness was not intended to impose such a Hobson's choice on police departments with finite resources.

In any event, even if requesting order from outside the residence or impounding the residence pending issuance of a warrant were practicable alternatives, that still would not mean that these options were constitutionally required. The approach taken by the courts below effectively requires the police—even when they witness the commission of criminal offenses, including an assault and underage drinking—to undertake any step that a court might subsequently characterize as an alternative course of conduct more respectful of privacy interests.

As the Court held in *Atwater*, however, "[o]ften enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest is made." 532 U.S. at 347. Relatedly, "this Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means, because '[t]he logic of such elaborate less-restrictive alternative arguments could raise insuperable barriers to the exercise

of virtually all search-and-seizure powers.'" *Board of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 837 (2002) (brackets in original) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 n.12 (1976)); see also, *e.g.*, *Atwater*, 532 U.S. at 350-51; *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983).

The approach of the courts below is utterly inconsistent with these standards. Under that approach, whenever a court, with unlimited time for after-the-fact reflection, can think of some alternative course that the police could have taken that might have lessened an intrusion on privacy interests, the court should brand the police conduct as unreasonable under the Fourth Amendment. Few law enforcement decisions about the presence of exigent circumstances—which necessarily must be made within seconds as an officer responds to rapidly unfolding events—could survive such after-the-fact judicial review.

The Fourth Amendment holds police officers responding to a breach of the peace to a standard of objective reasonableness. Under that standard, the officers in this case reasonably decided that they were not constitutionally required to remain outside the residence and plead with the adults inside to restore order and put a halt to underage revels at 3:00 a.m. Instead, the officers properly took control of the scene, thereby halting ongoing criminal conduct, restoring order, and minimizing risk of harm. That course of action was eminently reasonable given the practical realities confronting the officers called to the scene; it was equally reasonable within the meaning of the Fourth Amendment.

CONCLUSION

The judgment of the Supreme Court of Utah should be reversed.

Respectfully submitted,

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